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IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC"), is a non-profit association with 132 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983 PLAC has filed over 525 briefs as *amicus curiae* in both state and federal courts, including this Court, to present the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. A list of PLAC's corporate members is attached as Appendix A.

PLAC members engage in substantial litigation in both state and federal courts. A number of PLAC members have experienced punitive damage awards first-hand, and virtually all PLAC members live with the constant threat that a jury will convert a routine case into a litigation crisis by imposing a massive punitive damage award. Accordingly, PLAC members have a strong interest in ensuring meaningful appellate review of jury awards of punitive damages challenged as unconstitutionally excessive. PLAC, therefore, submits this brief in support of Petitioner.[1]

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[1] Both Petitioner and Respondent have consented to the filing of this brief. No counsel representing a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), recognized constitutional limits on excessive punitive damages awards. *BMW* requires trial courts to make a *legal* determination whether a punitive damage award that complies with state law nonetheless violates the federal Constitution. That ultimate determination is not a finding of fact and does not call for an exercise of discretion. Accordingly, appellate review for clear error or abuse of discretion makes no sense. Instead, appellate courts should review the trial court's ruling on the constitutional question of excessiveness the same way they review other legal determinations of constitutional dimension – *de novo*, *i.e.*, by applying the same legal test that the trial court applied without deferring to the trial court's conclusion.

Application of a *de novo* standard of review does not require the court of appeals to start from scratch. If the jury makes specific findings of fact (for example, through special interrogatories), appellate courts applying the *BMW* standard – like trial courts – should review those findings deferentially. Similarly, if the trial court makes its own written findings of fact the court of appeals should respect those findings, provided they are not clearly erroneous. But when it comes to the trial court's ultimate determination of constitutional excessiveness, the *de novo* standard applies. This is the same framework that governs the analogous context of the Excessive Fines Clause. *See United States v. Bajakajian*, 524 U.S. 321, 336 & n.10 (1998). There is no reason to apply a different scheme of review for a constitutional inquiry into excessiveness because it is required by the Fifth and Fourteenth Amendments rather than the Eighth.

The suggestion that courts should review punitive damage verdicts "in the light most favorable to the verdict" has a familiar ring, but only confuses matters. It makes no sense to apply such deference in determining the ultimate

constitutional question of excessiveness. The notion that reviewing courts should conduct their *BMW* review with a thumb on the scales in favor of approving the verdict misconstrues both *BMW* and the question before this Court. *BMW* requires a searching review, not a stunted and superficial review. Indeed, nothing in *BMW* itself suggests that this Court viewed the evidence in the light most favorable to the plaintiff in reviewing the award in that case. Moreover, the question here is how an appellate court should review a trial court's ruling concerning excessiveness, not the test that every reviewing court – both trial and appellate – should apply in conducting the *BMW* analysis.

Finally, nothing in the Seventh Amendment precludes appellate courts from reviewing a trial court's legal determination of excessiveness the same way they review other constitutional issues. First, the case law suggests that the jury's determination of the amount of punitive damages is not a "fact tried by a jury" within the meaning of the Re-Examination Clause. Second, and more fundamentally, *de novo* review of legal determinations does not require an appellate court to re-examine any fact.

ARGUMENT

I. THE NATURE OF THE EXCESSIVENESS INQUIRY MAKES A *DE NOVO* STANDARD THE PROPER STANDARD OF APPELLATE REVIEW

BMW imposes a substantive *legal* constraint on punitive damage awards, and the question of whether a challenged award comports with the constitutional limit is a *legal* question. This Court generally directs appellate courts to review legal questions, particularly questions of constitutional magnitude, *de novo*. In other words, appellate courts reviewing a legal question apply the same legal test as

the trial court, but reach their own conclusions without deferring to the trial court.

The legal question of constitutional excessiveness is no different. The jury is not asked, and does not answer, the legal question of constitutional excessiveness. Indeed, the question does not even arise until after the jury is discharged. The trial judge then determines whether the award complies with the Due Process Clause. An appellate court should review that legal judgment under a *de novo* standard of review.

A. Excessiveness Under *BMW* Is a Legal Issue, Not a Question for the Jury.

The question whether a punitive damage award is constitutionally excessive is an issue of law, not a question of fact or a discretionary judgment for the trial judge. Indeed, the question of constitutional excessiveness does not even arise until *after* the jury has rendered its verdict. For this reason, courts refuse to find an excessiveness challenge waived based on decisions made before the verdict. *See, e.g., MacCrone v. Edwards Center, Inc.*, 980 P.2d 1156, 1164 (Or. App. 1999) (*en banc*) (holding that an excessiveness challenge "cannot be required to be made during trial because the jury has not yet made its award"). The same courts, however, hold that challenges that implicate the jury's factfinding must be raised during trial. *See, e.g., id.* at 1163-64 (holding that defendant had waived a claim that there was insufficient evidence of malice to permit a punitive award by failing to raise it before the jury retired).

Not only does the issue of constitutional excessiveness not arise until after the jury is discharged, but the calculus of constitutional excessiveness includes factors that the jury normally does not consider under the relevant jurisdiction's law (which usually will be state law). *BMW* described three "guideposts" for courts to apply in determining whether a punitive award violates the Due Process Clause: "the degree

of reprehensibility of the [defendant's conduct]; the disparity between the harm or potential harm suffered by [plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." 517 U.S. at 574-75.

The court's inquiry, guided by these factors, is distinct from the jury's task. Courts generally instruct the jury as to the state law of punitive damages. State laws provide varying degrees of direction and make different factors relevant to the jury's initial assessment of punitive damages. There is, however, no reason to suspect that the applicable law will focus the jury's attention on all the factors relevant to the court's constitutional inquiry under *BMW*.

For example, *BMW* makes clear that the court must examine the ratio between the jury's compensatory award and its punitive award to determine whether the punitive award bears the requisite "reasonable relationship" to the actual and potential harm threatened by the defendant's misconduct. *See id.* at 580-83. *BMW* makes this ratio an *ex post* tool of judicial review to determine whether the two damage awards generated by the jury bear a reasonable relationship to each other. In many states, this ratio is not treated as an *ex ante* consideration for the jury to take into account in generating the two damage awards. Nor, acting under instructions dictated by state law, will the jury necessarily consider or determine the amount of potential harm, which *BMW* also makes relevant to the ratio analysis.

Likewise, *BMW* requires a reviewing court to compare the punitive award to "the civil or criminal penalties that could be imposed for comparable misconduct." *Id.* at 583. Again, however, the jury does not necessarily hear evidence of "legislative judgments" concerning the appropriate sanctions for comparable conduct, *id.*, or receive instructions to conform its award to those judgments.

The magnitude of prior punitive awards in the jurisdiction also may affect the constitutional sufficiency of

the defendant's "notice" concerning potential punishment. *See id.* at 594-95 (Breyer, J., joined by O'Connor and Souter, JJ., concurring). Likewise, the existence of prior awards against the defendant for the same course of conduct may affect the need for additional punishment. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 22 (1991). Despite the significance of the prior awards to the constitutional issue of excessiveness, the jury generally does not hear evidence concerning prior awards and does not expressly consider the relationship between its award and the awards in other cases. *See, e.g., Bowden v. Caldor, Inc.,* 710 A.2d 267, 280-81 (Md. 1998); *Garnes v. Fleming Landfill, Inc.,* 413 S.E.2d 897, 909 (W. Va. 1991).

In short, an excessiveness challenge requires the trial court to undertake a new and independent inquiry into an issue of law. The court must consider factors as to which the jury may not have been instructed and may not have heard evidence. To be sure, in its legal analysis, the court *may* draw on factual evidence that was before the jury. However, the evidence at trial will have no bearing on other relevant legal factors, and the court's ultimate conclusion as to excessiveness is a legal ruling on an issue of constitutional law. There is no automatic relationship between the factors that state law directs the jury to consider in making the initial assessment of punitive damages and the factors that the reviewing court must apply in answering the constitutional question of excessiveness. *See, e.g., Bowden,* 710 A.2d at 285 (holding that "simply because a principle should be considered by the court in reviewing a punitive damages award for excessiveness does not mean that the same principle should give rise to an appropriate issue at the trial before the jury or an appropriate issue for a jury instruction"); *Garnes,* 413 S.E.2d at 909 ("We do not give all of the factors to the jury because the jury will not possess all of the information necessary to use the factors properly."); *cf. In re The Exxon Valdez,* 229 F.3d 790, 798-99 (9th Cir. 2000) (holding that jurors should not be informed of cede-back agreements or other "outside influence[s] that might lead them to inflate or reduce their damages award in order to 'secure justice' for the parties," because "a jury should assess damages but not determine how much defendants should 'actually' pay or how much plaintiffs should 'actually' receive").

The Oregon Court of Appeals has acknowledged the independence of the legal question before the reviewing courts and the factual issues before the jury. By supplying a constitutional standard of excessiveness, *BMW* made clear that "a reviewing court's determination of whether the punitive damage award is unconstitutionally excessive is not dependent on instructions to the jury or on the jury's considerations." *Blume v. Fred Meyer, Inc.,* 963 P.2d 700, 706 (Or. App. 1998). The court cannot ask exclusively "whether a rational nexus exists between the evidence and the amount the jury awarded," because the constitutional question requires analysis of factors that are outside of "the evidence." *Id.* at 705 (quotation omitted). For purposes of the inquiry into constitutional excessiveness, the reviewing court assumes that the jury acted "rationally" in light of the evidence before it and the "statutory and common law factors that the jury is instructed and permitted to consider" under the relevant state law. *MacCrone,* 980 P.2d at 1164, 1165 (quotation omitted). In other words, the constitutional inquiry assumes that a punitive award complies with applicable state law and asks whether the award nonetheless violates the federal Constitution. The *BMW* analysis requires "an independent assessment of the jury's award to determine whether it is constitutionally excessive." *Id.* at 1165.[2]

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[2] *See also Garnes,* 413 S.E.2d at 909 ("Because all of the information is not available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that the trial court will be required to adjust the award downward because of

It is clear, therefore, that this "independent assessment" under *BMW* involves a determination of law, not a determination or redetermination of factual questions. In *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 642 (10th Cir. 1996), the Tenth Circuit acknowledged that it "ascertain[ed] no error of law in the instructions to the jury, nor in the jury's factfinding." Nonetheless, the court held that the punitive award "was so excessive it violated the substantive element of the Due Process Clause." *Id.* As the court emphasized, far from engaging in factual second-guessing, it was deciding "a federal constitutional issue." *Id.*

B. Review for Constitutional Excessiveness Does Not Call for a Discretionary Determination.

The inquiry into constitutional excessiveness does not require appellate or trial courts to reconsider factual determinations of the jury. Nor does it ask the court to make a discretionary judgment about whether a new trial is warranted. Rather, the question is straightforward and legal: does the award violate the federal Constitution? If it does, the reviewing court has no discretion to look the other way. On the other hand, in the absence of a violation, the Constitution provides no basis to disturb the verdict. In either event, on the issue of excessiveness, the Constitution grants the reviewing court no "discretion" to abuse. Under these circumstances, review for abuse of discretion simply makes no sense.

Nonetheless, Respondent Leatherman suggests exactly that. Opp. Cert. at 10-11. This suggestion fundamentally misconceives the nature of the excessiveness inquiry. In *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (11th Cir. 1999), the Eleventh Circuit dispatched this suggestion in

information available to him or her that would have been prejudicial to the defendant if presented to the jury.").

the plainest terms: "*BMW* makes clear that there is a constitutional limit on a punitive damage award beyond which neither the jury nor the court has any discretion to venture. The abuse of discretion standard is inapplicable where no discretion may be exercised." *Id.* at 1334.[3]

Leatherman relies on this Court's decision in *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), but nothing in that decision requires a different result. Browning-Ferris waived any challenge to excessiveness under the Due Process Clause, *see id.* at 276-77, and sought to resurrect its unsuccessful Excessive Fines Clause argument in the guise of a federal common law challenge, *id.* at 277-78. This Court declined to create a federal common law standard of excessiveness and limited Browning-Ferris to its request for a new trial or remittitur under Fed. R. Civ. P. 59(a). *See id.* at 278-79.

It is well-settled that a motion for a new trial under Rule 59(a) is addressed to the district court's discretion to set aside a verdict that is supported by enough evidence to withstand a motion for judgment as a matter of law under Fed. R. Civ. P. 50, but that "appears . . . to be against the weight of the evidence." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433 (1996) (quotation omitted). It follows that appellate courts should review district courts' discretionary decisions regarding the weight of the evidence under Rule 59(a) "under an abuse-of-discretion standard." *Browning-Ferris*, 492 U.S. at 279. But it by no means follows that the same standard would govern a legal challenge under the Due Process Clause.

[3] *See also Bowden*, 710 A.2d at 277-78 ("Obviously . . . a trial court cannot properly leave in effect an award which exceeds constitutional limits."); H. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 782 (1982) ("In my view, [the appellate court's] reference to discretion was inappropriate" because the issue under review "was not a question where the trial judge has 'a limited right to be wrong'").

Browning-Ferris tied the abuse of discretion standard of review to the absence of any federal legal test for excessiveness, and to the nature of the challenge that Browning-Ferris raised. The Rule 59(a) motion in *Browning-Ferris* sought a discretionary decision, and the district court exercised its discretion by denying it. In light of the requested relief and the absence (at that time) of a federal substantive standard of excessiveness, abuse of discretion was the only conceivable standard of review for the court of appeals to apply.

BMW, however, changed all that. *BMW* supplied a substantive federal standard of excessiveness. *Cf. BMW*, 517 U.S. at 605 (Scalia, J., dissenting) (observing that the Court "establish[ed] federal standards governing the hitherto exclusively state law of damages"). After *BMW*, a punitive award either is, or is not, unconstitutionally excessive. There is no role for discretion in resolving that question of constitutional law. The trial court must make a legal determination in the first instance, and appellate courts must review that legal determination *de novo*. *See, e.g., Johansen*, 170 F.3d at 1334 ("The ultimate question whether a punitive damage award is constitutionally excessive is, of course, a legal issue. We review questions of law *de novo*."); *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 464 (3d Cir. 1999) ("[O]ur review is plenary."); *MacCrone*, 980 P.2d at 1165 ("[W]e will make an independent assessment of the jury's award to determine whether it is constitutionally excessive in violation of due process under the *BMW* guideposts without regard to the trial court's reasoning.").

C. Under Both the Due Process and Excessive Fines Clauses, Excessiveness Is a Legal Determination that the Court of Appeals Should Review *De Novo*.

The ultimate determination of constitutional excessiveness is neither a finding of fact nor an exercise of discretion, but a legal determination. Accordingly, neither

clear error review nor abuse of discretion review applies. This Court's precedents make clear that in reviewing a legal determination on an issue of constitutional law, the federal courts of appeals apply a *de novo* standard of appellate review.

The question of whether a particular punitive damages award is excessive under the Due Process Clause closely resembles the question of whether a particular fine is excessive under the Eighth Amendment's Excessive Fines Clause. *Cf. Browning-Ferris*, 492 U.S. at 277 n.23. Both questions arise *after* the factfinder has imposed a monetary sanction. Both questions require a legal conclusion on an issue of constitutional law, even if the court draws on factual determinations to reach its ultimate legal conclusion. Both questions assume that the monetary assessment complies with the applicable law, but require a determination whether the assessment nonetheless is constitutionally excessive. Both questions require courts to give content to the Constitution's legal standard of excessiveness.

In *Bajakajian, supra*, this Court squarely held that the court of appeals should review *de novo* a district court's legal conclusion concerning an Eighth Amendment excessiveness challenge. Rejecting a call for abuse of discretion review, the Court explained that "the question of whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." 524 U.S. at 336 n.10.

The same *de novo* standard of appellate review should apply to the inquiry into the constitutional excessiveness of punitive damages. The two tests of constitutional excessiveness demand the same standard of appellate review. As with the Excessive Fines Clause issue, "the question of whether a [punitive damages award] is constitutionally excessive calls for the application of a constitutional

standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." *Id.*

Bajakajian illustrates that *de novo* review represents the norm when it comes to appellate review of ultimate determinations of constitutional law. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 691 (1996) ("We hold that the ultimate questions of reasonable suspicion and probable cause . . . should be reviewed *de novo*."); *Miller v. Fenton*, 474 U.S. 104, 112 (1985) (holding that "the 'ultimate constitutional question' of the admissibility of a confession [is] a 'mixed questio[n] of fact and law' subject to plenary federal review") (citation omitted).[4] There is no reason to depart from this norm and to provide less than *de novo* review to potential due process violations caused by excessive punitive damages.

This Court implicitly recognized the need for *de novo* review in *BMW*. Although the Court did not expressly address the standard of appellate review, its searching analysis of the constitutional propriety of the award defies any characterization other than *de novo*. *See, e.g.*, 517 U.S. at 584 (requiring consideration of "less drastic remedies"); *id.* at 596 (Breyer, J., concurring) (approving "this Court's detailed examination of the award"); *id.* at 600 (Scalia, J., dissenting) (criticizing the majority for "decid[ing] anew a matter of 'reasonableness' resolved in lower court

[4] The standard of appellate review does not turn on the precision of the legal rule or standard applied as a matter of substantive constitutional law. For example, even in the obscenity context when the constitutional standard had little more legal content than "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), this Court rejected the "appealing" suggestion that the constitutional issue be treated as one of fact and held that it could not "avoid making an independent constitutional judgment on the facts of the case." *Id.* at 187, 190 (opinion of Brennan, J.). *See also Miller v. California*, 413 U.S. 15, 25 (1973) (holding that "First Amendment values . . . are adequately protected by the ultimate power of appella[t]e courts to conduct an independent review of constitutional claims when necessary").

proceedings"). The Court nowhere spoke of deference or discretion, and it expressed its ultimate conclusion in plainly legal terms: "we are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit." *Id.* at 585-86.

The strong interest in uniformity of results provides an additional reason why *de novo* review of excessiveness determinations is particularly important. Like "the legal rules for probable cause and reasonable suspicion" at issue in *Ornelas*, the legal rules announced in *BMW* will "acquire content only through application." *Ornelas*, 517 U.S. at 697. The *Ornelas* Court's conclusion applies with equal force here: "Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id.*; *see also Fenton*, 474 U.S. at 114 (stressing the importance of "a federal appellate court['s] . . . primary function as an expositor of law" in contexts where "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case").

If the nascent standards of constitutional excessiveness laid out in *BMW* are to provide meaningful legal guidance, appellate courts must "maintain control of, and . . . clarify, [those] legal principles" by applying them to varying fact situations. *Ornelas*, 517 U.S. at 697. For all issues of constitutional law, appellate review plays a critical role in converting legal standards into predictable legal rules. *See, e.g., id.* But this critical role of appellate review takes on special importance in the context of an excessiveness test that stems from the Due Process Clause's requirement of fair notice. The standards laid down in *BMW* will not fulfill the goal of providing constitutionally sufficient notice if determinations of excessiveness are left to juries or trial courts. *De novo* appellate review will allow courts to develop the *BMW* factors based on experience with a wide variety of cases. Appellate courts can develop meaningful rules concerning, for example, the gradations within the

constitutional concept of reprehensibility and concerning what constitutes comparable conduct for purposes of comparing other civil and criminal penalties.

The special dangers posed by punitive damages also counsel in favor of *de novo* appellate review. As this Court has recognized, "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). The "wide discretion" wielded by juries "creates the potential" for biased verdicts. *Id.* These dangers heighten the need for "appellate review [that] makes certain that the punitive damages are reasonable." *Haslip*, 499 U.S. at 21. Appellate courts cannot deliver on that promise without engaging in *de novo* review of the legal issue of excessiveness.

De novo review likewise provides an independent check in cases in which trial-court errors may have contributed to a questionable punitive award. In such cases, the trial judge may be reluctant to reduce the jury's award and may view an excessiveness challenge as an attempt by the defendant to introduce a previously-rejected legal argument through the back door. In other cases, a long trial may give the trial judge a vested interest in the jury's verdict. Phenomena such as these may help explain one trial court's recent decision to let stand a $144 billion punitive damages award. *See* G. Fairclough & M. Geyelin, *Florida Judge Upholds Award in Tobacco Case*, Wall St. J. (Nov. 7, 2000) at A3. In any event, *de novo* review provides a critical independent check on trial judges who may be reluctant to disturb the excessive award. The nature of punitive damage awards and experience with those awards counsel in favor of providing an independent review of the ultimate constitutional issue of excessiveness.[5]

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[5] *See also Fenton*, 474 U.S. at 114 (suggesting that "independent . . . appellate review" could be justified "as a means of compensating for 'perceived shortcomings of the trier of fact by way of bias or some other factor . . .'") (citations omitted).

II. *DE NOVO* REVIEW DOES NOT REQUIRE IGNORING THE JURY'S AND THE TRIAL COURT'S SUPERIOR ACCESS TO THE EVIDENCE

A. Findings of Fact Actually Made by the Jury or by the Trial Court Should Be Reviewed Deferentially.

As explained above, the trial court's legal conclusion concerning the constitutionality of a punitive award should be reviewed *de novo*, like other issues of constitutional law. However, this conclusion begins, rather than ends, the description of how the court of appeals should conduct its review. *De novo* review of the ultimate legal issue does not imply that the court of appeals should disregard the jury's or the trial court's superior ability to make credibility judgments and to assess the evidence presented at trial. In this context as elsewhere, "[t]he standard of review that [the appellate court] appl[ies] depends upon the particular challenge asserted." *Inter Medical Supplies*, 181 F.3d at 464. To the extent an appellant challenges the trial court's ultimate legal determination, a *de novo* standard should apply. However, if an appellant challenges the findings of fact underlying the legal conclusion, the court of appeals will review those findings of fact deferentially.

The Court made this point clear in *Bajakajian*. At the same time that it held that the legal question of excessiveness required *de novo* review, the Court also acknowledged that "[t]he factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous." 524 U.S. at 336 n.10; *see also Fenton*, 474 U.S. at 112 (distinguishing between the constitutional question of voluntariness and "subsidiary factual questions"). Although *Bajakajian* did not involve a jury's verdict, findings of fact made by a jury (for example, in responding to special interrogatories), rather than by the trial judge, also must be reviewed deferentially.

Once again, there is no reason for a different conclusion when the review for constitutional excessiveness stems from the Fifth and Fourteenth Amendments, rather than the Eighth. To the extent that a challenge implicates the factual findings underlying the trial court's legal conclusion concerning excessiveness, those findings "must be accepted unless clearly erroneous." *Bajakajian*, 524 U.S. at 336 n.10; *see, e.g., Johansen*, 170 F.3d at 1334 (holding that excessiveness must be reviewed *de novo*, but that "[i]n performing this review, however, we shall accept the district court's findings of fact unless they are clearly erroneous").

B. *De Novo* Review of the Legal Issue of Excessiveness Coupled With Deference to Subsidiary Factual Findings Promotes Careful Judicial Decision-Making.

Clarifying that appellate courts should review the ultimate legal determination of excessiveness *de novo*, while respecting subsidiary factual findings actually made by the jury or the trial court, will encourage careful judicial decision-making. This standard of review provides the district court with a compelling incentive to ensure that the facts upon which its constitutional assessment turns are expressly articulated, either in the jury's answers to special interrogatories or in a written opinion. Such express findings, in turn, will facilitate judicial review. Clear factual findings assist the courts of appeals in developing legal principles of general application concerning the constitutional issue of excessiveness.[6]

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[6] Indeed, several appellate courts have held that the trial court is *required* to record the reasons supporting its disposition of an excessiveness challenge. *See, e.g., Morgan v. Woessner*, 997 F.2d 1244, 1257 (9th Cir. 1993), *cert. dismissed sub nom. Searle v. Morgan*, 510 U.S. 1033 (1994); *American Employers Ins. Co. v. Southern Seeding Servs., Inc.*, 931 F.2d 1453, 1458 (11th Cir. 1991); *Garnes.*, 413 S.E.2d at 910.

For example, where the plaintiff claims that punitive damages are appropriate on more than one ground (*e.g.*, because the defendant sold a product knowing it was defective and because the defendant discovered the defect and knowing failed to issue a post-sale warning), the trial court should submit special interrogatories to ensure that the reviewing courts know which facts formed the basis of the jury's award. Further, if there is evidence in the record upon which the trial court relies in evaluating the reprehensibility of the defendant's conduct – such as when the defendant discovered the defect – the trial court should note that evidence in its opinion and explain how it affects the award's constitutionality. Such findings allow both trial and appellate courts to develop meaningful legal principles about the constitutional limits on punitive damages.

Likewise, where the trial court relies upon evidence concerning the impact of the defendant's conduct within the relevant jurisdiction, the amount of profit derived from that conduct, or other relevant factors, *see BMW*, 517 U.S. at 572-74; *id.* at 591 (Breyer, J., concurring), the trial court should detail that factual evidence in its opinion. The trial court also should note its findings concerning factors that are not reflected in the evidence at trial, such as civil and criminal sanctions for comparable conduct and prior punitive awards. *See id.* at 583-85; *see also Garnes*, 413 S.E.2d at 909-10 (discussing other factors not brought before the jury).

Those factual findings will guide the trial court's legal analysis. Depending on the issues that are relevant or contested in the particular case, the court should discuss matters such as how the level of reprehensibility compares to the award; why the punitive award bears a reasonable relationship to the compensatory award or the potential harm; what comparable conduct determines the relevant civil and criminal penalties to use as benchmarks; and how the award compares to those benchmarks.

Such an opinion would provide a solid base of factual findings which the court of appeals would disturb only if they were unsupported by the evidence (in the case of facts found by the jury) or clearly erroneous (in the case of facts found by the trial court). It would also provide an extensive legal analysis that would inform the appellate court's *de novo* legal review. In addition to ensuring careful review at the trial level, thorough analysis and explanation by the district courts will greatly facilitate the appellate courts' task. Rather than confronting the product of a decisional black box – as happened here – the appellate court will have the benefit of both the relevant factual findings and the district court's legal analysis. If the appellate court takes a different view on the legal issue, it will provide clear direction for litigants and trial courts when they confront similar factual patterns. Even if such comprehensive analysis increases the burden on the district courts, this Court has emphasized the critical importance of independent judicial review when constitutional rights are at stake. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 & n.50 (1982).

III. PROPOSALS TO APPLY *DE NOVO* REVIEW IN THE LIGHT MOST FAVORABLE TO THE JURY'S VERDICT MISCONCEIVE THE NATURE OF THE CONSTITUTIONAL INQUIRY UNDER *BMW* AND THE ISSUE BEFORE THIS COURT

In their brief at the certiorari stage, *Amici* Professors Chemerinsky and McEvoy submit that the court of appeals should review the district court's excessiveness determination *de novo*, but in doing so should view the evidence in the light most favorable to the verdict. This suggestion misconceives the nature of *BMW*'s constitutional inquiry, the issue before this Court, and the meaning of *de novo* review.

A. Neither the Trial Court Nor the Court of Appeals Should Defer to "Findings of Fact" Not Actually Made By The Jury.

Amici's suggestion that the courts should apply the excessiveness standard set forth in *BMW* in the light most favorable to the verdict overlooks the fact that the jury does not consider and the verdict does not reflect many legally relevant factors. *See supra* at 5-7; *Blume*, 963 P.2d at 705-06. According to *amici*, the court of appeals should "ask whether a rational factfinder could have rendered the award on the record and instructions given the jury." *Amici* Br. at 20. *Amici*'s premise is wrong both factually and legally. First, as a matter of fact, the jury in most cases is *not* the factfinder on all of the matters involved in the constitutional excessiveness inquiry. Under *BMW*, that inquiry requires consideration of factors that are *not* necessarily reflected in "the record and instructions given the jury." The notion of deferring to the jury's verdict on matters that the jury did not consider makes no sense.

As discussed *supra*, courts have recognized that the analysis of excessiveness under the Due Process Clause does not simply duplicate the task assigned to the jury. *See, e.g., Harris v. Soley*, 756 A.2d 499, 508-10 (Me. 2000); *MacCrone*, 980 P.2d at 1164-65; *Blume*, 963 P.2d at 705-06; *Garnes*, 413 S.E.2d at 909-10. This difference dooms *amici*'s suggested analogy to *Jackson v. Virginia*, 443 U.S. 307 (1979).

In *Jackson*, the habeas petitioner claimed that the jury heard insufficient evidence to support his conviction for first-degree murder. As with any other situation where a litigant asks a reviewing court to *revisit the precise question that the jury considered* and to conclude that there is insufficient evidence to support the jury's finding, deference was appropriate. This Court held that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. As the Court explained, this "light most favorable" standard was required to "preserve[ ]" the jury's "role as weigher of the evidence." *Id.* The jury's role was at stake in *Jackson* because the defendant asked the reviewing court (on collateral review, no less) to reconsider the *precise question* put before the jury. That is not the case here. The jury is asked to make an initial assessment of punitive damages based on applicable *state* law. The reviewing court then asks *an analytically separate question* – a question that does not even arise until the jury makes its initial assessment – about whether the jury's award comports with *federal* due process requirements.[7]

More fundamentally, *amici*'s proposed standard misconstrues the relevant legal question under *BMW*. Under *BMW*, it makes no sense to "ask whether a rational factfinder could have rendered the award on the record and instructions given the jury." *Amici* Br. at 20. The *BMW* analysis *assumes* that a rational jury not only *could* have rendered the award consistent with the record and proper legal instructions, but that the jury *did in fact* render an award that is perfectly consistent with the record and applicable state law. Indeed, if there is any question whether the award comports with the record and instructions or otherwise complies with the applicable state law, courts should address those issues first by reducing or vacating the award under state law pursuant to basic principles of constitutional avoidance. *BMW* instead asks a court to determine whether a punitive damages award that fully complies with state law nonetheless violates the federal Constitution. In other words,

[7] For these reasons, *amici*'s criticism of the Eleventh Circuit's analysis in *Johansen* is unfounded. *Amici* take that court to task for failing to defer "to the factfinder on the case, *that is, the jury*," *Amici* Br. at 13 (emphasis added and other emphasis omitted), but *amici* overlook the fact that the jury did not decide many of the issues that *BMW* required the Eleventh Circuit to consider.

BMW assumes that the jury did its job properly under state law. Additional deference to the jury has no place in the constitutional analysis.

B. *Amici*'s Proposed Standard Conflicts With *BMW* and Is Beyond the Question Before the Court.

Amici's suggestion that courts should review punitive damage verdicts in the light most favorable to the verdict ignores not only the nature of *BMW*'s review of excessiveness, it also misconceives the issue before this Court. This Court granted *certiorari* limited to the following question: "What is the standard of review of a trial court's ruling on a challenge to the constitutionality of a punitive damage award?" *Amici*'s "light most favorable" argument conflates the test that *both* trial and appellate courts apply to judge the constitutionality of the jury's award and the question before this Court: the proper standard for an appellate court in reviewing a trial judge's determination concerning excessiveness. *Amici*'s suggestion that all reviewing courts – trial and appellate – apply a "light most favorable" standard would amend the substantive standard this Court adopted in *BMW*.

BMW supplies the substantive law for both trial and appellate courts to apply in judging the excessiveness of a punitive award. *BMW* mandates a searching review of the verdict and makes relevant a number of factors that were not before the jury. Accordingly, the jury's verdict is not generally entitled to deference. Of course, if the jury makes specific factual findings relevant to the punitive damages assessment, such as a finding of the defendant's net worth on a special interrogatory, that finding should be reviewed deferentially. But the ultimate constitutional question of excessiveness remains a legal issue for the trial judge, not for the jury. To suggest, as *amici* do, that trial and appellate courts should review the overall punitive damage award – as opposed to subsidiary factual questions – in the light most

favorable to (and with every reasonable inference drawn in favor of) the verdict is to suggest that courts review punitive damage awards with a thumb on the scales tipping them in the direction of approving the award.

That suggestion is inconsistent with *BMW*. As *amici*'s brief makes clear, applying their proposed standard makes the ultimate question of excessiveness come down to the award's rationality. *See, e.g., Amici* Br. at 4 (asking whether award "seem[s] rational"); *id.* at 5 (asking "whether the amount of the award is rational"); *id.* at 6 (asking whether the "amount of the punitive damages award is irrationally excessive"); *id.* at 7 (asking whether award "exceeds any *rational* appraisal of the punitive damages") (internal quotations omitted; emphasis in original). *BMW*, however, requires a reviewing court to go well beyond merely confirming that an award is rational. Indeed, an award that failed *amici*'s rationality test presumably would violate state-law standards, and so the courts would never reach *BMW*'s constitutional inquiry. In short, *amici*'s proposed standard, which like *BMW* would apply in trial and appellate courts alike, would require this Court to reconsider *BMW*.

However, this case does not implicate the substantive standards adopted in *BMW*. Rather, it involves only the procedural question of how the appellate court should review the trial court's *BMW* analysis. The question of the appellate standard of review is distinct from the substantive test that both trial and appellate courts should apply. *See, e.g., Honda*, 512 U.S. at 435-36 (Scalia, J., concurring); *cf. Gasperini*, 518 U.S. at 464-65 (Scalia, J., dissenting). Accordingly, *amici*'s standard is both contrary to *BMW* and beyond the scope of the question before this Court.

For purposes of that question, the important point is that – whatever the exact content of the legal standard the district court should apply to judge the constitutionality of a verdict – the district court applies a *legal* standard and makes a *legal* determination. Appellate courts should review that legal

determination, like rulings on other issues of constitutional law, *de novo*. *See, e.g., Johansen*, 170 F.3d at 1334 ("The ultimate question whether a punitive damage award is constitutionally excessive is, of course, a legal issue. We review questions of law *de novo*.").[8]

IV. THE RE-EXAMINATION CLAUSE POSES NO OBSTACLE TO *DE NOVO* APPELLATE REVIEW

The Seventh Amendment limits judicial re-examination of "fact[s] tried by a jury." For at least two reasons, this provision does not preclude the courts of appeals from reviewing district courts' legal determinations concerning constitutional excessiveness under a *de novo* standard of review. First, as explained below, the amount of punitive damages is not a "fact tried by a jury" within the meaning of the Re-Examination Clause. Therefore, the Seventh Amendment does not limit the review of punitive damage awards. Second, even if the Clause has some application to punitive damages review, it obviously does not prevent appellate review of errors of law. A court does not engage in forbidden "re-examination" of any "fact tried by a jury" when it confronts the legal issue of an award's consistency with the Constitution.

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[8] As a result of the logical distinction between the substantive legal standard for judging excessiveness and the procedural standard of appellate review, any doubts about the validity or sufficiency of the *BMW* guideposts have no bearing on the proper standard of appellate review. *Cf. Honda*, 512 U.S. at 435-36 (Scalia, J., concurring) (joining the majority's decision holding that procedural due process required judicial review of a punitive damage award based on the existence of substantive excessiveness standards under Oregon law). This case takes the substantive standard as a given and asks only about the proper standard of appellate review. Concerns about the appropriateness of the substantive standard should not cloud the question of the proper standard of appellate review.

A. The Re-Examination Clause Does Not Limit Punitive Damages Review Because the Amount of Punitive Damages Is Not a "Fact Tried By a Jury" Under the Seventh Amendment.

In *Gasperini*, Justice Scalia observed that "[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury." 518 U.S. at 459 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (internal citation omitted). While the other Members of this Court did not address this question in *Gasperini*, other courts have agreed with this observation. *See, e.g., Continental Trend Resources*, 101 F.3d at 643; *Bowden*, 710 A.2d at 288; *cf. Atlas Food Sys. and Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996) ("The jury's determination of the amount of punitive damages, however, is not a factual determination about the degree of injury . . . .").

Punitive damages differ fundamentally from compensatory damages. The latter compensate the victim, presumably in full. The former – to put it bluntly – are a windfall to the plaintiff aimed at punishing or deterring the defendant. *See* Note, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damages Litigation*, 105 Harv. L. Rev. 1900, 1903 (1992). No plaintiff ever is "entitled" to punitive damages. Even where the plaintiff has satisfied the legal predicates for punitive damages, the jury need not award them. As the jury instructions approved by this Court in *Haslip* emphasized: "Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so." 499 U.S. at 6 n.1. *Accord Smith v. Wade*, 461 U.S. 30, 52 (1983); Restatement (Second) of Torts § 908 cmt. d (1979).[9]

[9] This is not to say that plaintiffs do not carry the burdens of establishing the availability to punitive damages and providing the jury with a basis

The corollary of this principle is that the jury does not resolve a factual issue within the meaning of the Re-Examination Clause by choosing the *amount* of punitive damages. For these reasons, it distorts reality to characterize the amount of punitive damages as a "fact" that is "tried" by the jury.[10]

B. The Constitutional Excessiveness Inquiry Involves a Question of Law that Does Not Implicate the Re-Examination Clause.

Even if the amount of punitive damages is considered a "fact tried by a jury," *de novo* appellate review of the constitutionality of an award does not violate the Re-Examination Clause. As discussed above, a court decides a question of law, not a question of fact, when it determines whether a punitive damages award exceeds the constitutional limits. *See supra* at 3-8. Although the Seventh Amendment restricts judicial re-examination of "fact[s] tried by a jury," the Amendment poses no obstacle to appellate consideration

to award a particular amount of punitive damages. Nonetheless, as many courts treat the jury's punitive award as the product of a black box, the award should not be treated as an ordinary "fact tried by a jury" for purposes of the Re-Examination Clause.

[10] While this Court has not confronted the question squarely, *dicta* in several cases suggest that the Seventh Amendment does not require jury determination of punitive damages at all. *See Tull v. United States*, 481 U.S. 412, 425-26 & n.9 (1987) (holding that the Seventh Amendment does not require jury determination of amount of civil penalty and declaring more broadly that "[w]e have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial"); *Curtis v. Loether*, 415 U.S. 189, 196 & n.12 (1974) (stating that "[w]e need not, and do not, go so far as to say that any award of monetary relief must necessarily be 'legal' relief" for purposes of the Seventh Amendment, and citing *Swofford v. B&W, Inc.*, 336 F.2d 406, 414 (5th Cir. 1964), which held that the Seventh Amendment did not require a jury trial on punitive damages in a patent infringement action)). *See generally* P. Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. Chi. L. Rev. 179 (1998).

of questions of law. Accordingly, whatever constraints the Seventh Amendment may impose upon weight-of-the-evidence review in traditional remittitur practice, *see Gasperini*, those constraints do not apply to an appellate court's review of the legal question of a punitive award's consistency with the Due Process Clause under *BMW*.

Before *BMW*, in the absence of an excessiveness objection founded upon a rule of constitutional law, challenges for excessiveness took the form of motions for a new trial or remittitur under Fed. R. Civ. P. 59(a). Such motions essentially sought a declaration that the jury's punitive damages award was against the weight of the evidence. The motions were addressed to the discretion lodged uniquely in the district court (as permitted at common law) to order a new trial if the verdict was against the weight of the evidence or would result in an injustice. A remittitur under this regime was "a substitution of the court's judgment for that of the jury regarding the appropriate award of damages." *Johansen*, 170 F.3d at 1331.

Such motions sought *reconsideration of the precise fact already found by the jury*. Accordingly, such motions implicated important Seventh Amendment concerns. Under Rule 59(a) and "the rules of the common law," U.S. Const. amend. VII, the district court alone enjoys a limited and discretionary authority to substitute its view for the jury's on a factual issue. Appellate review of remittitur and new trial orders, therefore, was limited to the deferential abuse of discretion standard. *See Gasperini*, 518 U.S. at 434-36, 438. This made sense both because a Rule 59 motion seeks reconsideration of a fact found by the jury, and because the motion is addressed to the trial court's discretion.

An excessiveness challenge under *BMW* is fundamentally different. A court confronted with such a challenge does not second-guess any "fact tried by a jury," but rather tests the verdict for compliance with a standard of substantive law that was not before the jury. Rather than

revisiting the jury's assessment of punitive damages under state law (as in a remittitur motion), *BMW* directs courts to ask a distinct legal question. Not surprisingly, the reviewing court evaluates many factors that the jury had no occasion to consider. In contrast to a remittitur motion, a reviewing court under *BMW* does not "simply determine[] how closely the jury verdict will be scrutinized for compliance with the instructions." *Id.* at 464-65 (Scalia, J., dissenting). Instead, the reviewing court assumes compliance with the instructions but asks whether there is a distinct defect under federal law. Unlike a remittitur, "[a] constitutional reduction . . . is a determination that the law does not permit the award." *Johansen*, 170 F.3d at 1331; *accord Continental Trend Resources*, 101 F.3d at 642-43.

As the Eleventh Circuit explained, a finding of excessiveness under the Due Process Clause therefore involves no discretion and no re-examination of jury findings. Instead of ordering a new trial or remittitur under Rule 59(a), "a court proceeds under Rule 50 . . . in the entry of judgment for a constitutionally reduced award and the Seventh Amendment is not implicated in this legal exercise." *Johansen*, 170 F.3d at 1331. Under *BMW*, the defendant does not seek to reduce the award as against the weight of the evidence or to invoke the trial court's discretion. Instead, the defendant seeks to have the award reduced because it is excessive as a matter of law. "A constitutionally reduced verdict, therefore, is really not a remittitur at all." *Id.*[11]

Nothing in *Gasperini* casts any doubt upon an appellate court's power to enforce substantive legal limits, even with respect to *compensatory* damage awards (which are factual determinations governed by the Re-Examination Clause). The Court recognized that the Seventh Amendment limits

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[11] *Amici* fail to recognize that "a new trial motion" under Rule 59(a) is *not* "the device used to challenge the size of a jury's damage award" under *BMW*'s constitutional standard. *Amici* Br. at 4. This failure may explain why *amici* have proposed a standard that conflicts with *BMW*.

procedural innovations that intrude on the jury's province, such as the New York statute there at issue, but *Gasperini* in no way suggests that the Seventh Amendment somehow freezes substantive law or strips appellate courts of their ability "to maintain control of, and to clarify, the legal principles" through "[i]ndependent review."[12] *Ornelas*, 517 U.S. at 697. If, for example, a state expressly limited the recovery of awards for pain and suffering, the Re-Examination Clause would not prevent a federal court of appeals from reversing a compensatory damage award that explicitly included improper compensation for pain and suffering. Indeed, *Gasperini* observed that federal courts have found no Seventh Amendment obstacle to the application of state-law caps on compensatory damages. 518 U.S. at 429 n.9; *see also Southern R. v. Bennett*, 233 U.S. 80, 87 (1914) (distinguishing between excessiveness "as matter of law" and "upon the evidence"); *New York, L.E. & W.R. Co. v. Estill*, 147 U.S. 591 (1893).

Bajakajian likewise demonstrates the distinction between forbidden re-examination of facts tried by the jury and permissible independent consideration of questions of law. In *Bajakajian*, this Court did not re-examine the finding that the full amount of the currency was "involved in" the offense and therefore forfeitable under the statute, *see* 524 U.S. at 325-26. Instead, the Court addressed the distinct question of whether forfeiture of that full amount was unconstitutionally excessive. To be sure, the Re-Examination Clause was not

[12] Rather than condemning appellate review of questions of substantive law, *Gasperini* viewed the New York statute at issue as a partially procedural/partially substantive hybrid, which assigned appellate courts the primary responsibility for policing compensatory damages awards on factual grounds. *See* 518 U.S. at 431-32. Accordingly, the Court struck a compromise that allowed the federal district courts to apply the New York standard, while the courts of appeals reviewed those decisions as they would remittiturs. Nothing in *Gasperini*, however, suggests that there is any obstacle to federal courts imposing purely substantive legal limits on damage awards.

implicated there because Mr. Bajakajian had waived his right to a jury trial on the "involved in" issue. *See id.* at 325. But the Re-Examination Clause also was not implicated for the more fundamental reason that the relevant constitutional excessiveness test does not require the re-examination of any fact found by the jury. In sum, an appellate court simply does not re-examine a factual finding when the court considers whether a judgment is consistent with the Constitution.

CONCLUSION

For the foregoing reasons, and those expressed in Petitioner's Brief, this Court should reverse the judgment below.

Respectfully submitted,

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APPENDIX

APPENDIX A

CORPORATE MEMBERS, PRODUCT LIABILITY ADVISORY COUNCIL, INC.

3M
Allegiance Healthcare Corporation
Altec Industries
American Home Products Corporation
American Medical Systems, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Andrx Corporation
Anheuser-Busch Companies, Inc.
Appleton Papers, Inc.
Aventis Pharmaceuticals
BASF Corporation
Baxter International, Inc.
Bayer Corporation
BIC Corporation
Biomet, Inc.
Biro Manufacturing Company Inc.
Black & Decker (U.S.) Inc.
BMW of North America, Inc.
Bobcat Company
Boeing Company, The
Bombardier Recreational Products
BP Amoco Corporation
Bridgestone/Firestone, Inc.
Briggs & Stratton Corporation
Brown and Williamson Tobacco
Brown-Forman Corporation
Budd Company, The
C. R. Bard, Inc.
Caterpillar, Inc.

Chevron Corporation
CLARK Material Handling Company
Coleman Company, Inc., The
Compaq
Continental General Tire, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
DaimlerChrysler Corporation
Dana Corporation
Deere & Company
Dow Chemical Company, The
E. & J. Gallo Winery
E.I. DuPont de Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Estee Lauder Companies
Euclid Hitachi Heavy Equipment, Inc.
Exxon Mobil Corporation
FMC Corporation
Ford Motor Company
Freightliner Corporation
Gates Corporation, The; The Stant Corporation
General Electric Company
General Motors Corporation
Georgia-Pacific Corporation
Glaxo Wellcome Inc.
Goodyear Tire & Rubber Company, The
Great Dane Limited Partnership
Guidant
Harley-Davidson Motor Company
Harsco Corporation, Gas & Fluid Control Group
Heil Company, The
Henkel Corporation
Honda North America, Inc.

Hyundai Motor America
International Paper Company
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.
Joseph E. Seagram & Sons, Inc.
Kawasaki Motors Corp., U.S.A.
Kolcraft Enterprises, Inc.
Kraft Foods, Inc.
Lucent Technologies Inc.
Mack Trucks, Inc.
Makita USA, Inc.
Mazda (North America), Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mitsubishi Motors R. & D. of America, Inc.
Monsanto Company/G.D. Searle & Co.
Motor Coach Industries International, Inc.
Niro Inc.
Nissan North America, Inc.
O. F. Mossberg & Sons, Inc.
Otis Elevator Co.
PACCAR Inc
Panasonic Company
Pentair, Inc.
Pfizer Inc.
Philip Morris Companies, Inc.
Polaris
Porsche Cars North America, Inc.
Procter & Gamble Co., The
Raymond Corporation, The
Raytheon Aircraft Company

Rheem Manufacturing
RHI Refractories America
RJ Reynolds Tobacco Company
Rover Group, Ltd.
Schindler Elevator Corp.
SCM Group USA, Inc.
Sears, Roebuck and Company
Shell Oil Company
Sherwin-Williams Company, The
Siemens Corporation
Smith & Nephew, Inc.
Snap-on Incorporated
Sofamor Danek, Medtronic Inc.
Solutia Inc.
Sturm, Ruger & Co., Inc.
Subaru of America
Synthes (U.S.A.)
Textron Inc.
Thomas Built Buses, Inc.
Toro Company, The
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Inc.
UST (U.S. Tobacco)
Visteon Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation
Wilbur-Ellis Company
Wilson Trailer Company
Yamaha Motor Corporation, U.S.A.